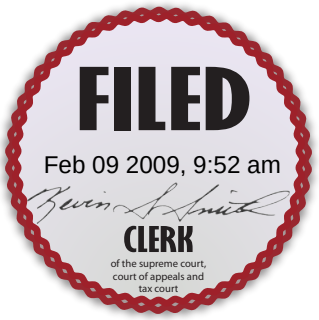

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IN THE
COURT OF APPEALS OF INDIANA

JASON J. STEURY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A02-0806-PC-555
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0710-PC-49

February 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jason J. Steury appeals the denial of his petition for post-conviction relief from his convictions on seven counts of child molesting[1] each as a Class A felony. He appeals raising several issues, which we consolidate and restate as:

I. Whether he received the effective assistance of trial counsel when his attorney failed to raise a claim under the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution that he was improperly arrested for a probation violation, and therefore his statements to the police should have been suppressed; and

II. Whether the evidence presented at trial was sufficient to support his convictions.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts supporting Steury's convictions as set forth by this court on his direct appeal are as follows:

> The record reveals that on December 16, 2003, C.W., who was twelve at the time, reported to her history teacher that she thought she was pregnant due to her sexual activity with her mother's boyfriend, Steury. At the time, Steury lived with C.W.'s mother, Laura, . . . and served as the primary caregiver for C.W. and her sister, as well as for Steury's and Laura's twin daughters. Laura was often away from home for work from about five o'clock in the morning until four o'clock in the afternoon, or later, sometimes seven days a week. Such was her schedule on December 14, 2003. According to C.W., at some time in the afternoon of December 14, while Laura was at work, the other children were asleep, and she was lying on the couch at their home, Steury "c[a]me over with a blanket," took her clothes off, and had sexual intercourse with her. *Tr*. at 93.
>
> C.W. also testified that on the morning of December 16, 2003, also at home, she again had sex with Steury. According to C.W., she came downstairs

[1] *See* Ind. Code § 35-42-4-3.

from her upstairs bedroom and went into Steury's bedroom at his request, whereupon he initiated sexual intercourse with her by removing her pajamas and kissing her and then "put[ting] his penis inside [her]," and "mov[ing] up and down." *Tr*. at 94.

C.W. testified that she and Steury had also engaged in sexual intercourse in November, as well as "almost every month besides when he was in jail." *Tr*. at 95. According to C.W., this sexual activity began when she was nine years old when she lived at a house on Cherry Street. C.W.'s testimony regarding this first time was that she was in her sister's room when Steury came into the room, pushed her on the bed, took both of their clothes off except their shirts, told her she was "safe," and put his penis in her vagina. *Tr*. at 96. According to C.W., her sexual activity with Steury was frequent and occurred "too many [times] to count," including more than 100 times per year when she was ages nine, ten, and eleven. *Tr*. at 95. C.W. indicated that she and Steury would generally engage in this sexual activity in her mother's bed "almost every morning." *Tr*. at 97. C.W. alleged that it was Steury's routine to call her down from upstairs in the mornings, and when she appeared, to tell her to sit on the bed. According to C.W., Steury did not wear clothes to bed, and the two would then have sexual intercourse. C.W. further testified that this routine was interrupted for approximately two to three months during the 2003 year because Steury was not living at the house during that time.

Laura testified that in October of 2003, "right before [C.W.'s] 13th birthday," she was contacted by Office of Family and Children investigator Michelle Coons regarding claims by C.W. at school that C.W. had participated in oral sex with Steury. *Tr*. at 79. According to Laura, she took C.W. "out to the country where nobody else was around" and asked her whether these claims were true, whereupon C.W. answered that they were not true. *Tr*. at 80. C.W. denied at trial that she had ever made any such claims at school in October. The claims were subsequently deemed to be unsubstantiated. At trial, C.W. testified to having claimed in approximately 2000 or 2001 that Laura had held a knife to her throat. C.W. admitted that her purpose for making this allegation was to be able to live with her father.

Testimony from Coons indicated that in investigating C.W.'s December 16 allegations, she drove C.W. to the police station to be interviewed by Captain Teresa Henderson, and the following day she accompanied C.W. to her house to gather the clothing she had worn on December 16. The parties subsequently stipulated to the laboratory results following tests of C.W.'s clothing.

> At approximately 5:45 p.m. on December 16, Captain Henderson contacted then Detective Matthew Felver to interview Steury about C.W.'s allegations. Steury was arrested for a probation violation and brought to the Blackford County Security Center for an interview. During this interview, Steury signed a standard waiver-of-rights form and subsequently admitted engaging in sexual intercourse with C .W. multiple times.
>
> C.W. was examined by Dr. Neil Stalker on December 17, 2003, who found superficial abrasions and trauma in the fossa navicularis area of her vagina. It was Dr. Stalker's opinion that such trauma was attributable to the insertion of something, though likely not a tampon, into C.W.'s vagina.
>
> Steury was charged on December 17, 2003 with seven counts of child molesting as a Class A felony, and a warrant was issued for his arrest. On March 2, 2005, Steury moved to suppress all statements he made prior to, during, or following his arrest. The court denied his motion. Following a jury trial beginning on March 8, 2005, Steury was convicted on all seven counts. On April 8, 2005, the trial court sentenced him to an aggregate sentence of sixty years.

Steury v. State, No. 05A04-0602-CR-84 (Ind. Ct. App. 2007), *trans. denied*; *Pet'r's Ex*. 9 at 2-5.

On direct appeal, Steury's counsel argued that: (1) the trial court abused its discretion when it admitted his statement to the police, in which he waived his Miranda rights and confessed to having sex with C.W., because he claimed that the statement was obtained through coercion and violated his Fifth Amendment right against self-incrimination; (2) the evidence was insufficient to support five of his convictions because there was a fatal variance between the dates listed in the charging information and the evidence introduced at trial; (3) C.W.'s testimony at trial regarding uncharged acts of molestation by Steury constituted fundamental error; and (4) the imposition of consecutive sentences was not supported by proper aggravating circumstances and that his sentence was inappropriate. This court

affirmed Steury's convictions finding that: (1) his statement was properly admitted into evidence as the totality of the circumstances demonstrated that his confession was not involuntary; (2) there was no fatal variance between the charging information and the evidence presented at trial; (3) the admission of C.W's testimony regarding Steury's history of molesting her was not fundamental error; and (4) the trial court properly sentenced him to consecutive sentences and his sentence was not inappropriate.

On October 1, 2007, Steury filed a *pro se* petition for post-conviction relief. He later filed an amended petition on December 17, 2007. An evidentiary hearing was held on Steury's petition on January 17, 2008. Steury requested thirty days in which to submit proposed findings of fact and conclusions, and the trial court granted this request. On February 20, 2008, the post-conviction court denied Steury's petition for post-conviction relief. The same day, Steury filed a motion for an extension of time in which to file his findings and conclusions. The trial court denied this motion because it had already entered its order denying post-conviction relief. Steury now appeals the denial of his petition for post-conviction relief.

DISCUSSION AND DECISION

I. Standard of Review

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006),

trans. denied, *cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Fisher v. State*, 878 N.E.2d 457, 463 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id*. We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher*, 878 N.E.2d at 463.

II. Ineffective Assistance of Trial Counsel

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher*, 878 N.E.2d at 463. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United

States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*.

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id*. "If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *Fisher*, 878 N.E.2d at 463-64.

Steury argues that he was denied the effective assistance of his trial counsel when his attorney failed to properly raise claims that his statements to police should not have been admitted into evidence under the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution. He specifically claims that his trial counsel did not raise any argument regarding the issuance of the warrant or the legality of Steury's arrest based on the warrant, and that if he had, Steury's statement to the police would have been properly suppressed as fruit of an illegal arrest and without the statement, he would not have been convicted. He contends that his arrest for a probation violation was not proper

because the arrest warrant was issued on less than the requisite probable cause as it did not meet the statutory requirements under Indiana Code section 35-38-2-3(b)(2).

At the time that Steury was arrested, he was on probation for battery in Blackford County. "Probation is a favor granted by the State, not a right to which a criminal defendant is entitled." *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). Because probation revocation deprives a defendant only of his conditional liberty and not of his absolute liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. *Id*. Indiana Code section 35-38-2-3(b)(2) states, "When a petition is filed charging a violation of a condition of probation, the court may . . . order a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others." Steury contends that a warrant for his arrest due to a probation violation was improperly issued because the State failed to prove that he was either at risk for fleeing the jurisdiction or for causing harm to others.

Assuming without deciding that the State did fail to prove either of these things, the evidence obtained as a result of Steury's arrest was not inadmissible as the police had independent probable cause to arrest Steury at the time they interviewed him. "'Probable cause adequate to support a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a [felony].'" *Ware v. State*, 859 N.E.2d 708, 720 (Ind. Ct. App. 2007) (quoting *Griffith v. State*, 788 N.E.2d 835, 840 (Ind. 2003)), *trans. denied*. The amount of evidence necessary to meet the probable cause requirement for a

warrantless arrest is determined on a case-by-case basis. *Id*. "Probable cause can rest on collective information known to the law enforcement organization as a whole, and not solely on the personal knowledge of the arresting officer." *Griffith*, 788 N.E.2d at 840. The uncorroborated testimony of a crime victim may provide probable cause necessary for a warrantless arrest. *Sears v. State*, 668 N.E.2d 662, 667 n.9 (Ind. 1996) (citing *Borkholder v. State*, 544 N.E.2d 571, 575-76 (Ind. Ct. App. 1989)).

Here, on the afternoon of December 16, 2003, the victim, twelve-year-old C.W., was brought to the Hartford City Police Department by a member of the Office of Family and Children and interviewed by Captain Henderson. C.W. stated that her mother's boyfriend, Steury, had been having sex with her and that this molestation had begun when she was nine years old. C.W. told the police that the last time Steury had sex with her was on the afternoon of December 14, and that he had approached her on the sofa, told her how pretty she was and how much he loved her, and began kissing her. Steury then took off C.W.'s clothes, removed his pants, lay on top of her, and put his penis inside of her, "pushing up and kissing her." *Pet'r's Ex*. 3 at 2. C.W. told the police that Steury had previously had sex with her on many occasions, but that she had not told anyone because she was afraid of Steury. She decided to tell someone about what was happening because Steury had informed her that she had missed her period and might be pregnant. Steury told her that he would get a pregnancy test for her, and if she was pregnant, "she [would] not have to worry" because "he would get rid of it." *Id*. C.W. wanted to tell because "she did not think it would be right for [Steury] to get rid of the baby." *Id*.

Based on this information, Captain Henderson contacted Detective Felver and informed him that she was conducting a child molesting investigation and she had interviewed the victim. She relayed the information given by C.W. regarding Steury's actions. Based on what he was told by Captain Henderson, Detective Felver had probable cause to arrest Steury for Class A felony child molesting at the time that he spoke with Steury at the police station after he had been arrested on the probation revocation warrant. *See* Ind. Code § 35-42-4-3; *Borkholder*, 544 N.E.2d at 575-76 (victim's statement that she had been molested by defendant gave police probable cause that defendant had committed felony and justified warrantless arrest).

The United States Supreme Court has stated four factors that should be considered when evaluating whether the taint of an illegal arrest has been purged: (1) the giving of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62, 45 L. Ed. 2d 416 (1975). Here, as to the first factor, Steury waived his Miranda rights when he was interviewed. As for the temporal proximity, Steury indicates that he was interviewed by Detective Felver approximately an hour and a half after he was arrested for the probation violation. *Appellant's Br*. at 2. As to the presence of intervening circumstances, the police had independent probable cause to arrest Steury for child molesting at the time of the interview. Therefore, the statements obtained from Steury did not come from the exploitation of any alleged illegal arrest because they could have been obtained

independently. Under the fourth factor, the purpose of the arrest warrant was to take Steury into custody for a probation violation. As for the flagrancy of the conduct, Steury had in fact violated his probation by failing to pay his fines at the time that the warrant was issued, and as previously stated, the police had independent probable cause to arrest Steury at the time they spoke to him. Further, Detective Felver informed Steury of the reason for the interview before obtaining any incriminating statements. We therefore conclude the causal connection between any potential illegal police conduct and the procurement of the incriminating statements from Steury was "'attenuated as to dissipate the taint'" of any alleged illegal arrest. *Quinn v. State*, 792 N.E.2d 597, 600 (Ind. Ct. App. 2003) (quoting *U.S. v. Green*, 111 F.3d 515, 521 (7th Cir. 1997), *cert, denied*), *trans. denied*.

Because we have determined that Steury's statements to the police were properly admissible at trial, there was not a reasonable probability that the outcome of Steury's trial would have been different even if his trial counsel had raised the issues under the Fourth Amendment and Article 1, section 11 of the Indiana Constitution. Therefore, Steury has not shown that he was prejudiced by his trial counsel's performance.[2] The post-conviction court properly denied his petition for post-conviction relief.

[2] Steury also claims that his trial counsel was ineffective for several additional reasons in Section IV of his brief. *Appellant's Br*. at 13-14. However, he has failed to develop any argument in support of his contentions or to show how he was prejudiced by any of these alleged failures by his trial counsel. "A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record." *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied* (2006); *see also* Ind. Appellate Rule 46(A)(8)(a). Therefore, Steury has waived these contentions.

II. Sufficient Evidence

If an issue was raised on direct appeal, but decided adversely, it is barred from post-conviction review by the doctrine of res judicata. *Lindsey*, 888 N.E.2d at 322 (citing *Timberlake*, 753 N.E.2d at 597). If an issue was known and available, but not raised on direct appeal, it is waived. *Id.* On Steury's direct appeal, he raised a claim of insufficient evidence to support his convictions, and this court held that "Steury's admissions and C.W.'s testimony are sufficient evidence of Steury's conviction for the multiple acts of molestation occurring in November, October, June, May, and April 2003 as charged." *Pet'r's Ex.* 9 at 11. Therefore, the issue of whether Steury's convictions were supported by sufficient evidence is barred by res judicata. To the extent that Steury's contention regarding the sufficiency of the evidence is based on different grounds from those alleged in his direct appeal, such claims are waived because they were available on direct appeal, but not raised. *Lindsey*, 888 N.E.2d at 322. The post-conviction court did not err in denying Steury's petition.[3]

Affirmed.

BAKER, C.J., and NAJAM, J., concur.

[3] Steury also argues that the post-conviction court abused its discretion when it denied his motion for extension of time in which to file his proposed findings of fact and conclusions. At the conclusion of the post-conviction hearing on January 17, 2008, Steury requested thirty days in which to file his proposed findings and conclusions instead of the sixty days offered by the post-conviction court. On February 20, 2008, the court entered an order denying Steury's petition for post-conviction relief. The same day, the post-conviction court received Steury's motion for extension of time. The court denied the motion because it had already entered its order denying post-conviction relief. We do not believe that the trial court abused its discretion when it did so.